



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 7405948

Date: FEB. 6, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a software engineer under the second-preference, immigrant classification for members of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of a bachelor's degree in the field of study required by the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also signifies that employment of a foreign national will not harm wages and work conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification document with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE EDUCATIONAL REQUIREMENTS

A petitioner must establish that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).¹ In evaluating a beneficiary's qualifications for a position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of software engineer as a U.S. bachelor's degree, or a foreign equivalent degree, in "Computer Science" and five years of experience in the job offered or as a consultant, programmer analyst, or technical lead. Part H.14 of the certification also states that the position requires "Proficiency" in various computer languages and technologies.

On the labor certification, the Beneficiary attested that, by the petition's priority date, an Indian university awarded her a bachelor of technology degree in "Information Technology (Computer Science)." As proof of the Beneficiary's educational qualifications, the Petitioner submitted copies of her "Information Technology" degree and university marks statements regarding her "Information Technology" program. The Petitioner also submitted an independent, professional evaluation of the Beneficiary's foreign educational credentials. The evaluation concludes that the Beneficiary's Indian degree equates to a U.S. bachelor's degree in "Information Technology."

As the Director concluded, the record did not demonstrate the Beneficiary's possession of a bachelor's degree in the field of study required for the offered position. Part H.4 of the labor certification specifies the "Major field of study" of the requisite bachelor's degree as "Computer Science." Part H.7 indicates the Petitioner's acceptance of "an alternate field of study." But part H.7 identifies the alternate field as "computer science," the same field listed in part H.4. Part H.14 also does not indicate the Petitioner's acceptance of a bachelor's degree in information technology or a related field. Thus, the labor certification indicates that only a bachelor's degree in computer science will satisfy the position's minimum educational requirements. The Petitioner's evidence indicated the Beneficiary's possession of a bachelor's degree in information technology. The record therefore did not demonstrate her possession of a bachelor's degree in the requisite field of computer science.

On appeal, the Petitioner submits an evaluation of the Beneficiary's educational credentials from a different, professional evaluator. This evaluation concludes that the Beneficiary's Indian degree equates to a U.S. bachelor's degree in "Computer Science." But the new evaluation does not demonstrate her possession of a bachelor's degree in the requisite field of study. The new evaluation states that it bases its conclusion, in part, on "the nature of the [Beneficiary's] course work." But the evaluation does not detail the classes she completed or compare them to the curriculum of a U.S.

¹ This petition's priority date is April 19, 2017, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

baccalaureate program in computer science. Rather, the evaluation states only that the Beneficiary “completed specialized courses in her area of concentration, Information Technology, including course work in Computer Science and related areas.” Also, the record does not explain why the new evaluation’s stated field of equivalency (computer science) differs from that of the prior evaluation (information technology), or why we should consider the new evaluation to be more authoritative than the prior one. Thus, the new evaluation is conclusory and unpersuasive. *See Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988) (holding that the immigration service may reject or afford lesser evidentiary weight to an expert opinion that conflicts with other evidence of record “or is in any way questionable”).

A preponderance of evidence does not demonstrate the Beneficiary’s possession of a baccalaureate degree in the field of study required by the offered position. We will therefore affirm the petition’s denial.

III. THE EXPERIENCE REQUIREMENTS

Although unaddressed by the Director, the record also does not demonstrate the Beneficiary’s possession of the minimum experience required for the requested visa classification or the offered position. Beneficiaries seeking classification as advanced degree professionals must have “advanced degrees or their equivalent.” Section 203(b)(2)(A) of the Act. The term “advanced degree” means:

any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree.

8 C.F.R. § 204.5(k)(2). Also, as previously indicated, a petitioner must demonstrate a beneficiary’s possession of all DOL-certified job requirements of an offered position by a petition’s priority date. *Matter of Wing’s Tea House*, 16 I&N Dec. at 160.

As previously discussed, this labor certification states that the offered position of software engineer requires not only a bachelor’s degree in computer science and “Proficiency” in various computer languages and technologies, but also at least five years of experience in the job offered or as a consultant, programmer analyst, or technical lead. On the labor certification, the Beneficiary attested that, by the petition’s priority date, she gained almost 10 years of full-time, qualifying experience. She stated that a consulting company employed her as a software test engineer from November 2007 until the filing of the labor certification application in April 2017.

To establish a beneficiary’s qualifying experience, a petitioner must provide a letter from the beneficiary’s former employer(s). 8 C.F.R. § 204.5(g)(1). The letter must include the name, address, and title of its signatory, and a description of the beneficiary’s experience. *Id.* If such evidence is unavailable, USCIS will consider other documentation regarding a beneficiary’s experience. *Id.*

The Petitioner submitted copies of two letters and a certificate from the Beneficiary’s claimed former employer. The certificate indicates that the consulting company employed the Beneficiary as a “Project Engineer” from November 2007 until her resignation in April 2018. The two letters,

dated separately in May and August of 2018, are addressed to USCIS, apparently in support of a nonimmigrant visa petition on the Beneficiary's behalf. The letters state a need for her work at the site of one of the company's clients in the United States. The letter describes her proposed duties as a quality automation engineer and identifies the Petitioner as her proposed employer.

The documents from the consulting company do not establish the Beneficiary's claimed, qualifying experience. Contrary to 8 C.F.R. § 204.5(g)(1), the certificate does not describe the Beneficiary's experience. The certificate also does not state her proficiency with the computer languages and technologies specified on the labor certification. The two company letters are also insufficient. They describe the Beneficiary's proposed, nonimmigrant employment by the Petitioner after the petition's priority date. The letters do not describe her claimed, qualifying experience with the consulting company before the priority date.

The Petitioner also submitted an affidavit from a purported, former co-worker of the Beneficiary. The affidavit states that the affiant worked with the Beneficiary for the consulting company from September 2009 to April 2018, and identifies the Beneficiary's position as "Senior QA/QA Lead." Like the company documents, the affidavit from the purported, former co-worker does not demonstrate the Beneficiary's claimed, qualifying experience. Contrary to 8 C.F.R. § 204.5(g)(1), the affidavit does not constitute a letter from the Beneficiary's former employer, and the Petitioner has not otherwise established the unavailability of such a letter. Also, the affidavit is unreliable. The affidavit describes the Beneficiary's job duties and states her proficiency with the required computer languages and technologies. But it does not sufficiently explain how the affiant gained personal knowledge of the Beneficiary's job duties and proficiencies. The record also lacks corroborating evidence of the affiant's claimed employment by the consulting company during the Beneficiary's purported tenure there. In addition, the affidavit lists the Beneficiary's former job duties in language identical to that describing the job duties of the offered position on the labor certification. The identical job duties suggest that the affiant did not attest to the Beneficiary's former duties from personal knowledge, but rather copied the duties listed on the labor certification.

Further, the labor certification, the company certificate, and the affidavit from the purported, former co-worker identify the Beneficiary's prior position by different job titles. The documents respectively list her former job as "Software Test Engineer," "Project Engineer," and "Senior QA/QA Lead." A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The discrepancies in the title of the Beneficiary's former job cast additional doubt on her claimed, qualifying experience.

Also, none of the job titles describing the Beneficiary's former position match the acceptable, alternate occupations of consultant, programmer analyst, and technical lead stated on the labor certification. The Petitioner therefore must demonstrate the Beneficiary's acquisition of the requisite experience in the job offered. For labor certification purposes, experience "in the job offered" means "experience performing the key duties of the job opportunity." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at *4 (BALCA Oct. 24, 2011) (citations omitted). The Beneficiary's former job duties to which she attested on the labor certification do not demonstrate that she performed the key duties of the offered position. The labor certification states the primary duties of the offered position as designing, developing, deploying, configuring, creating, and executing test

plans, test cases, and document phases of the software development life cycle, using designated computer languages and technologies. On the labor certification, the Beneficiary attested to her prior performance of “Test case execution” duties and her proficiency in most of the designated computer languages and technologies. But she attested that her former position primarily involved: managing teams; monitoring team effort and capacity; delegating work to team members; analyzing requirements; testing scripts; coordinating off- and on-shore quality assurance teams; analyzing business requirements; and “Bug” tracking and reporting. The record therefore does not establish that the Beneficiary performed the key duties of the offered position in her prior job. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). Also, the Beneficiary did not attest on the certification to her proficiency in HTML, one of the programming languages required for the offered position. The record therefore does not demonstrate the Beneficiary’s possession of the requisite experience in either the job offered or an acceptable, alternative occupation.

For the foregoing reasons, the record does not establish the Beneficiary’s possession of the minimum experience required for the requested visa classification or the offered position. For this additional reason, we cannot approve the petition. In any future filings in this matter, the Petitioner must explain the inconsistencies of record and provide independent, objective evidence of the Beneficiary’s claimed, qualifying experience.

IV. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the record does not establish the Petitioner’s ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition’s priority date until a beneficiary obtains lawful permanent residence status. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition’s priority date. If a petitioner did not annually pay a beneficiary the full proffered wage, USCIS examines whether it generated annual amounts of net income or net current assets sufficient to pay any annual differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner’s ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg’l Comm’r 1967).²

Here, the labor certification states the proffered wage of the offered position of software engineer as \$105,123 a year. As previously noted, the petition’s priority date is April 19, 2017.

The Petitioner did not submit evidence that it employed the Beneficiary. Thus, based solely on wages paid, the record does not demonstrate the Petitioner’s ability to pay the proffered wage.

² Federal courts have upheld USCIS’ method of determining ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715 *X (D.S.C. Sept. 9, 2016).

The Petitioner submitted a copy of its federal income tax return for 2017, the year of the petition's priority date. The return reflects net income of \$707³ and net current assets of \$157,276. The net income amount does not equal or exceed the annual proffered wage of \$105,123. Based on the Petitioner's net income, the record therefore does not establish the company's ability to pay the proffered wage. The net current assets amount would exceed the annual proffered wage. USCIS records, however, indicate the Petitioner's filing of Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of April 19, 2017, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).⁴

USCIS records indicate the Petitioner's filing of at least eight Form I-140 petitions for other beneficiaries that were pending or approved as of April 19, 2017, or filed thereafter.⁵ The record, however, lacks the proffered wages and priority dates of the other petitions. Thus, USCIS cannot calculate the total amount of combined proffered wages that the Petitioner must demonstrate its ability to pay. The record therefore does not establish the Petitioner's ability to pay the proffered wage. For this additional reason, we cannot approve the petition.

In any future filings in this matter, the Petitioner must provide the proffered wages and priority dates of its other petitions. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages, including documentation of its payment of wages to applicable beneficiaries from 2017 onward and materials supporting the factors stated in *Sonegawa*. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. The company must also submit copies of annual reports, federal tax returns, or audited financial statements supporting its continuing ability to pay the combined proffered wages in 2018 and, if available, 2019.

³ For federal income tax purposes in 2017, the Petitioner chose to be treated as an S corporation. S corporations list additional income, deductions, or credits from sources outside of their trades and businesses on Schedules K to IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* U.S. Internal Revenue Serv. (IRS), Instructions to IRS Form 1120S 22, <https://www.irs.gov/pub/irs-pdf/i1120s.pdf> (last visited Jan. 9, 2020). We therefore consider line 18 of the Petitioner's IRS Form 1120S, "Income/loss reconciliation," to most accurately reflect the company's net income amount in 2017.

⁴ A petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or that USCIS rejected, denied, or revoked. A petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions, or after their corresponding beneficiaries obtained lawful permanent residence.

⁵ USCIS records identify the eight other petitions by the following receipt numbers: [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] and [redacted] [redacted]

V. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of a bachelor's degree in the field of study required by the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.